

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

LINDA HABA, ) CASE NO. C10-540-MAT  
)  
Plaintiff, )  
)  
v. ) ORDER DENYING DEFENDANT’S  
) MOTION TO DISMISS  
MICHAEL J. ASTRUE, Commissioner )  
of Social Security, )  
Defendant. )

INTRODUCTION

Plaintiff, proceeding *pro se*, seeks relief from a decision of the Commissioner of the Social Security Administration (Commissioner) assessing an overpayment of Disability Insurance Benefits (DIB). (Dkt. 4.) The Commissioner moves to dismiss this action under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction and/or under Rule 12(b)(6) for failure to state a claim upon which relief may be granted. (Dkt. 11.) Now, having considered all submissions associated with the pending motion, as well as the remainder of the record, the Court concludes that the Commissioner’s motion to dismiss should be denied.

01 BACKGROUND

02 In February 1992, plaintiff was found disabled and entitled to DIB as of April 22, 1990.  
03 (Dkt. 4 at 11 (Ex. 4).) The Social Security Administration (SSA) subsequently advised  
04 plaintiff, in a notice dated August 13, 2000, that she was not entitled to benefits for the period of  
05 January 1999 through February 2000 due to her participation in substantial gainful activity.  
06 (Dkt. 19 at 6 (Ex. 1).) The SSA explained that plaintiff had been overpaid \$12,012.00 in  
07 benefits. (*Id.* at 7.)

08 Plaintiff requested a waiver of the overpayment. In a notice dated July 18, 2001, the  
09 SSA stated it could not approve the request for a waiver based on the facts in its possession at  
10 that time. (*Id.* at 14 (Ex. 2).) The notice scheduled a personal conference, to take place on  
11 August 13, 2001, in order to consider plaintiff's request for a waiver of the overpayment, which  
12 at that time totalled \$8,544.00. (*Id.*) A subsequent letter, dated August 22, 2001, reflected  
13 that plaintiff failed to appear for a personal conference on either August 13, 2001 or on the date  
14 of the letter. (*Id.* at 16 (Ex. 3).) The letter informed plaintiff that the SSA found no basis for  
15 changing its decision to deny the waiver request and directed plaintiff to refund the outstanding  
16 overpayment within thirty days. (*Id.*)

17 Plaintiff timely filed a request for hearing. On October 16, 2002, an Administrative  
18 Law Judge (ALJ) held a hearing, with plaintiff appearing and offering testimony. (*Id.* at 20  
19 (Ex. 4).) The ALJ issued a decision, on January 12, 2003, finding plaintiff was not “without  
20 fault” in accepting the overpayment and, therefore, that a waiver of the overpayment, at that  
21 point totalling \$8,070.00, could not be granted. (*Id.* at 20-23.)

22 In a letter dated February 12, 2003, plaintiff requested review of the ALJ's decision.

(Dkt. 4 at 9 (Ex. 3).) The Appeals Council, on April 2, 2003, found no basis for review, making the ALJ's decision the final decision of the Commissioner. (Dkt. 19 at 24-25 (Ex. 5).) The Appeals Council advised plaintiff that she could commence a civil action within sixty days of the date of its decision and that it would be presumed she received a copy of the decision within five days of the decision date "unless a reasonable showing to the contrary [was] made." (*Id.* at 24.) The notice also advised plaintiff that, if she could not file a civil action within sixty days, she could ask the Appeals Council for an extension upon provision of a "good reason for not meeting the deadline." (*Id.* at 25.)

Plaintiff did not commence a civil action within sixty days of the date of the Appeals Council's decision. She contends she was not aware any overpayment was outstanding until she received a billing statement in October 2009. (Dkt. 15 at 1.) In a letter to the Appeals Council dated October 9, 2009, plaintiff stated: "I sent in a request for an appeal of a decision in February 2003, and have not heard anything back. I had heard that it may take a long time to receive an answer, but this is a little longer than I expected." (Dkt. 19 at 26 (Ex. 6).) She again asked for a waiver of the overpayment. (*Id.*) The SSA responded, in a letter dated February 1, 2010, by enclosing a copy of the Appeals Council's April 2003 decision denying plaintiff's request for review. (*Id.* at 27 (Ex. 7).) Plaintiff submitted her complaint to this Court on March 30, 2010. (Dkt. 1.)

#### DISCUSSION

Pursuant to section 405(g) of title 42, a Social Security claimant may obtain review of a "final decision" of the Commissioner by commencing a civil action "within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may

01 allow.” 42 U.S.C. § 405(g). Absent “a reasonable showing to the contrary[.]” a claimant is  
02 presumed to have received notice of the decision five days after the decision date. 20 C.F.R. §  
03 422.210(c).

04 The requirement to obtain a final decision of the Commissioner is jurisdictional.  
05 *Vernon v. Heckler*, 811 F.2d 1274, 1277 (9th Cir. 1987) (citing *Mathews v. Eldridge*, 424 U.S.  
06 319, 328 (1976)). In this case, with the Appeals Council’s decision denying plaintiff’s request  
07 for review, the Commissioner issued a final decision subject to review in this Court. *See* 20  
08 C.F.R. § 404.981; *accord* § 422.210.

09 The sixty-day period for filing a civil action is not jurisdictional. *Vernon*, 811 F.2d at  
10 1277. Instead, this time period constitutes a statute of limitations. *Id.* (citing *Mathews*, 424  
11 U.S. at 328 n.9; *Weinberger v. Salfi*, 422 U.S. 749, 763-64 (1975)). As a statute of limitations,  
12 the sixty-day filing deadline is subject to equitable tolling. *Id.* (citing *Bowen v. City of New*  
13 *York*, 476 U.S. 467, 480 (1986)). The question in this case is, therefore, whether this action is  
14 subject to dismissal based on the applicable statute of limitations or whether that limitations  
15 period may be equitably tolled.

16 The affirmative defense of statute of limitations is properly raised in a responsive  
17 pleading. *Vernon*, 811 F.2d at 1278 (citing Fed. R. Civ. P. (8)(c)). However, it may, in  
18 certain situations, “be raised in a motion to dismiss when the running of the statute is apparent  
19 from the face of the complaint.” *Id.* (citing *Conerly v. Westinghouse Elec. Corp.*, 623 F.2d  
20 117, 119 (9th Cir. 1980)). “Yet such a motion to dismiss should be granted “only if the  
21 assertions of the complaint, read with the required liberality, would not permit the plaintiff to  
22 prove that the statute was tolled.”” *Id.* (quoting *Jablon v. Dean Witter & Co.*, 614 F.2d 677,

01 682 (9th Cir. 1980)).

02 In this case, the Commissioner neither raised an affirmative defense in a responsive  
03 pleading, nor raised an argument properly discussing the statute of limitations, or in any way  
04 addressing equitable tolling, in its motion to dismiss. The Commissioner, instead, argued that  
05 plaintiff's claims were jurisdictionally barred and/or had in some way failed to state a claim  
06 upon which relief may be granted.

07 The Commissioner specifically argued that plaintiff failed to show "good cause" for  
08 obtaining an extension of the sixty-day time period for seeking court review. This argument  
09 recognizes that an extension of the sixty-day filing deadline may be granted by the  
10 Commissioner where a request is made to the Appeals Council in writing and with a showing  
11 that a claimant had "good cause for missing the deadline[.]" 20 C.F.R. § 404.982; *accord* §  
12 422.210(c). *See also* § 404.911 (in considering the existence of good cause, the SSA  
13 considers: (1) circumstances that kept the claimant from making the request on time; (2)  
14 whether any action of the agency misled the claimant; (3) whether the claimant did not  
15 understand the requirements of the Social Security Act resulting from amendments to the Act,  
16 other legislation, or court decisions; and (4) whether the claimant had any limitations which  
17 prevented her from timely filing). Good cause may, for example, be found where a claimant  
18 "did not receive notice of the determination or decision." § 404.911(b)(7).

19 The Commissioner argued, with the support of a declaration, that it was not aware of  
20 any request for extension filed by plaintiff (Dkt. 11 at 5 and Dkt. 19 at 5) and that, consequently,  
21 plaintiff failed to bring forth a judicially reviewable final decision. However, while a request  
22 for an extension of time might avert the need for litigation, "a claimant apparently need not

01 request an extension from the [Commissioner] prior to raising an . . . equitable tolling  
02 argument[.]” *Vernon*, 811 F.2d 1278 (citing *Bowen*, 476 U.S. 467).

03 Equitable tolling “focuses on whether there was excusable delay by the plaintiff[]” and  
04 “may be applied if, despite all due diligence, a plaintiff is unable to obtain vital information  
05 bearing on the existence of his claim.” *Santa Maria v. Pacific Bell*, 202 F.3d 1170, 1178 (9th  
06 Cir. 2000). A statute of limitations may, therefore, be equitably tolled where a plaintiff shows  
07 “(1) that he has been pursuing his rights diligently, and (2) that some extraordinary  
08 circumstance has stood in his way.” *Harris v. Carter*, 515 F.3d 1051, 1054-55 (9th Cir. 2008)  
09 (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). As explained by the Ninth Circuit:

10 We have stated that the purpose of the equitable tolling doctrine “is to soften the  
11 harsh impact of technical rules which might otherwise prevent a good faith  
12 litigant from having a day in court.” *Jones v. Blanas*, 393 F.3d 918, 928 (9th Cir.  
13 2004). Equitable tolling also serves to “prevent the unjust technical forfeiture of  
14 causes of action.” *Id.* Equitable tolling is typically granted when litigants are  
15 unable to file timely petitions as a result of external circumstances beyond their  
16 direct control. *See [Stillman v. LaMarque]*, 319 F.3d 1199, 1202 (9th Cir. 2003)].  
17 Equitable tolling is typically denied in cases where a litigant’s own mistake  
18 clearly contributed to his predicament. *See [Lawrence v. Florida]*, 549 U.S. 327,  
19 336-37 (2007)].

20 *Id.* at 1055.

21 In this case, plaintiff filed her complaint more than six and half years after the  
22 presumptive deadline for filing. However, plaintiff claims she was not aware that the  
overpayment issue was still outstanding until she received a billing statement in October 2009.  
(*See* Dkt. 15.) She avers that, on the advice of a local Social Security office, she thereafter sent  
the Appeals Council the above-described October 2009 letter inquiring as to the status of her  
appeal, and that she filed her complaint within sixty days of receiving the February 2010 letter

01 which enclosed the Appeals Council's decision. (*Id.*) Plaintiff contends that "[t]he local office  
02 stated they also had never received a response to the request for an appeal." (*Id.* at 1.)

03       The extensive delay between the filing of plaintiff's request for review and her inquiry  
04 as to its status raises doubts as to plaintiff's diligence and the question of whether this is one of  
05 the "rare" cases "in which the equities of tolling are compelling." *Bowen*, 476 U.S. at 480-81  
06 (finding tolling appropriate where the government's "secretive conduct" prevented timely  
07 filing). *See also Vernon*, 811 F.2d at 1275, 1278 (reversing and remanding for consideration  
08 of equitable tolling where plaintiff alleged he was told by an SSA employee that an extension to  
09 filing would be granted). However, the Commissioner, despite being asked for additional  
10 briefing on the subject (*see* Dkt. 16), failed to counter plaintiff's contention as to a gap of some  
11 six and a half years between the issuance of the Appeals Council's decision and plaintiff's  
12 receipt of a billing statement for the overpayment. Nor did the Commissioner address  
13 plaintiff's assertions as to her conversations with the local SSA office. At the very least, the  
14 Court requires additional information and properly supported argument in order to consider the  
15 issue of equitable tolling. *See, e.g., Vernon*, 811 F.2d at 1278 (reversing and remanding where  
16 the statute-of-limitations issue was "not so clear-cut as to justify its resolution . . . prior to  
17 affording [the claimant] the opportunity to further a factual basis for . . . equitable tolling.")  
18 The Court, therefore, finds insufficient basis, at this time, for dismissing plaintiff's claims.

#### 19                                   CONCLUSION

20       For the reasons stated above, the Commissioner's motion to dismiss (Dkt. 11) is  
21 DENIED. This dismissal is without prejudice to the Commissioner seeking dismissal based  
22 on the statute of limitations, either before or after the filing of a responsive pleading. *See id.*;

01 *Jablon*, 614 F.2d at 682.

02 DATED this 18th day of November, 2010.

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05 Mary Alice Theiler  
06 United States Magistrate Judge  
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